ATTORNEYS FOR APPELLANT:

W. RUSSELL SIPES
TODD BARNES
George & Sipes
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

THEATRE ON THE SQUARE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0606-CV-315
	)	
NICK TAYLOR,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robyn Moberly, Judge
Cause No. 49D12-0510-PL-40201

May 10, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Nick Taylor ("Taylor") filed a complaint in Marion Superior Court against Theatre on the Square ("the Theatre"). After the Theatre failed to file an answer, Taylor filed a motion for judgment on the pleadings, which the trial court granted. The Theatre then filed a motion to set aside judgment pursuant to Trial Rule 60(B). The trial court denied the motion and the Theatre appeals arguing that Taylor's counsel's actions constitute misconduct warranting relief under Trial Rule 60(B). Concluding that the Theatre is not entitled to relief under Trial Rule 60(B), we affirm.

Facts and Procedural History

Taylor owned a Dodge pick-up truck that was damaged while being used by Theatre's employees. On October 12, 2005, Taylor filed a complaint against the Theatre alleging that Theatre employees made a duplicate key to the truck and used his truck without his knowledge and/or consent on four or five occasions. Taylor also alleged that the employees damaged the truck and the Theatre failed to pay for the repairs. On October 28, 2005, the Theatre's attorney entered an appearance in the case and requested an extension of time to file an answer. The trial court extended the Theatre's time until November 25, 2005.

The Theatre failed to file an answer. Consequently, on December 1, 2005, Taylor filed a motion for judgment on the pleadings arguing that he was entitled to judgment as a matter of law. On December 14, 2005, the Theatre filed its answer and affirmative defenses. On January 20, 2006, the trial court granted Taylor's motion for judgment on the pleadings and entered a judgment against the Theatre in the amount of $4,848.96.

The Theatre filed a motion to set aside judgment, which was denied. The Theatre now appeals. Additional facts will be provided as necessary.

Standard of Review

Intially, we note that Taylor has failed to file an appellee's brief. In such a case, we need not undertake the burden of developing arguments for the appellee. Painter v. Painter, 773 N.E.2d 281, 282 (Ind. Ct. App. 2002). Applying a less stringent standard of review, we may reverse the trial court if the appellant establishes prima facie error. Id. Prima facie is defined as at first sight, on first appearance, or on the face of it. Id.

Discussion and Decision

In its brief, the Theatre treats the court's January 20, 2006 judgment as a default judgment and its arguments rely on that characterization. However, Taylor's motion is clearly titled "Motion for Judgment on the Pleadings," and states, in pertinent part:

> Comes now Plaintiff, Nick Taylor [ ] by counsel, and pursuant to Indiana Trial Rule 12(C), hereby moves the Court to enter judgment in his favor and against Defendant, Theatre on the Square [ ], because there is no genuine issue as to any material fact and based upon the pleadings, the Plaintiff is entitled to judgment as a matter of law.

Appellant's App. p. 23. In the motion, Taylor noted that the Theatre failed to file an answer to his complaint, and therefore, the allegations contained in the complaint were deemed admitted.[1]

The trial court granted the motion on January 20, 2006, and issued the following order:

[1] See Ind. Trial Rule 8(D) (2007) ("Averments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied in the responsive pleading.").

> This matter having come before the Court on Plaintiff Nick Taylor's Motion for Judgment on the Pleadings, and the Court being in all things duly advised, now GRANTS said motion and ORDERS judgment for Plaintiff and against Defendant in the amount of $4,848.96 plus post judgment interest.

Appellant's App. p. 6. Therefore, the Theatre's treatment of the judgment as a default judgment is inaccurate.[2]

Next, we observe that the Theatre filed a motion to set aside judgment on February 13, 2006, in which the Theatre argued that Taylor's "legal counsel has never contacted the [Theatre's] legal counsel regarding this matter." Appellant's App. p. 42. The Theatre also asserted a meritorious defense. The court issued the following order denying the Theatre's motion:

> After taking this matter under advisement, the court denies Defendant's motion to set aside default judgment. The court finds that defendant's request fails on meritorious defense. Were this matter tried on the merits, a result similar to the default judgment is highly likely.

Appellant's App. p. 7. Because the trial court appears to have acquiesced in the Theatre's treatment of the judgment as a default judgment, we will address the Theatre's argument on its merits.

A default judgment is disfavored, and any doubt of its propriety must be resolved in favor of the defaulted party. Comer-Marquardt v. A-1 Glassworks, LLC, 806 N.E.2d 883, 886 (Ind. Ct. App. 2004). Indiana law strongly prefers disposition of cases on their merits. Coslett v. Weddle Bros. Constr. Co., 798 N.E.2d 859, 861 (Ind. 2003). Yet, a trial court's decision to set aside a default judgment is entitled to deference, and we

[2] However, we acknowledge the conflicting entries on the court's chronological case summary, which state: "Court approves order granting general judgment, $4,848.96 not plus costs and interest w/o relief" and "Case is disposed by default judgment." Appellant's App. p. 2.

review its decision for an abuse of discretion. Id. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court. Anderson v. State Auto. Ins. Co., 851 N.E.2d 368, 370 (Ind. Ct. App. 2006). "A general default judgment may be affirmed by any theory supported by the record." Id.

The Theatre argues that the facts presented in this case are analogous to those in Smith v. Johnston, 711 N.E.2d 1259 (Ind. 1999). In Smith, Johnston filed a complaint against Dr. Smith alleging medical malpractice after a medical review panel found that Dr. Smith failed to comply with the appropriate standards of care. Id. at 1261. Dr. Smith was represented by an attorney from Locke Reynolds throughout the panel proceedings. Johnston's attorney made no effort to communicate with the Locke Reynolds attorney after Johnston's settlement demand was rejected on the date the complaint was filed. Id. Dr. Smith was served with the complaint by certified mail at his place of business, but no appearance was filed on Smith's behalf. Johnston moved for a default judgment approximately six weeks after filing the complaint. Default judgment was granted and Dr. Smith appealed.

Dr. Smith argued that Johnston's attorney's failure to provide a copy of the complaint to Locke Reynolds or otherwise notify him of the lawsuit before moving for default judgment when she had knowledge that they represented Smith in the matter constituted misconduct warranting relief from the default judgment pursuant to Trial Rule 60(B)(3).[3] Id. at 1262-63. Our supreme court concluded that if the plaintiff's attorney

[3] Trial Rule 60 (B)(3) provides: "On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by

has knowledge of the defendant's representation, such "knowledge gives rise to a corresponding duty under the Rules of Professional Conduct to provide notice before seeking any relief from the court."[4] Id. at 1263.

> Thus lawyers' duties are found not only in the specific rules of conduct and rules of procedure, but also in courtesy, common sense and the constraints of our judicial system. As an officer of the Court, every lawyer must avoid compromising the integrity of his or her own reputation and that of the legal process itself. These considerations alone demand that [Johnston's attorney] take the relatively simple step of placing a phone call to Locke Reynolds before seeking a default judgment.

Id. at 1263-64. Accordingly, the court held that "the default judgment was obtained by actions that were prejudicial to the administration of justice and therefore constitute misconduct warranting relief under Trial Rule 60(B)(3)." Id. at 1264.

Relying on Smith, the Theatre argues that because its attorney had entered his appearance in the case, Taylor's counsel "was required to, and at the very least, take the relatively simple step of placing a phone call to [the Theatre's] attorney." Br. of Appellant at 5. Yet, the Theatre has never alleged that it did not receive a copy of Taylor's motion.[5] The certificate of service attached to Taylor's motion for judgment on the pleadings indicates that a copy of the motion was served on the Theatre's attorney. Appellant's App. p. 25. Therefore, the Theatre received notice that Taylor was seeking a judgment on the pleadings. We cannot agree with the Theatre's assertion that Taylor's counsel was additionally required to place a phone call to its attorney. In addition, more

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default, for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]"

[4] Specifically, the court determined that although Johnston's attorney's conduct was consistent with Trial Rules 4 and 5 concerning service of process, it was unacceptable under the Rules of Professional Conduct.

[5] In his response to the Theatre's motion to set aside judgment, Taylor asserted that the Theatre "always received proper notice of all documents filed by Plaintiff in this case." Appellant's App. p. 52.

than one month passed between Taylor's December 1, 2005 motion for judgment on the pleadings and the trial court's January 20, 2006 order granting the motion. During this time period, the Theatre filed its answer and affirmative defenses and had every reasonable opportunity to seek a hearing on or otherwise respond to Taylor's motion beyond the mere filing of its answer and affirmative defenses.

For all of these reasons, we conclude that the Theatre has not established that it is entitled to relief from judgment under Trial Rule 60(B).[6]

Affirmed.

NAJAM, J., and MAY, J., concur.

[6] Because the Theatre has not established any grounds for relief under Trial Rule 60(B), we need not consider its argument that meritorious defenses exist.